Supreme Court of the United States.

No. 182.—October Term, 1903.

The Newburyport Water Company, Appellant, vs. The City of Newburyport. } Appeal from the Circuit Court of the United States for the District of Massachusetts.

[April 4, 1904.]

The Newburyport Water Company, appellant, is a Massachusetts corporation created by special act on April 23, 1880, which act was subject to alteration, amendment or repeal at the pleasure of the legislature.

As authorized by its charter, the water company established a water supply system in the city of Newburyport. On August 17, 1880, the water company entered into a contract with the city to furnish water, for fire puposes, during a term of twenty years, with the privilege to the city of purchasing the waterworks property after the expiration of ten years.

In the year 1893 the legislature passed an act, (chapter 471,) conferring power upon the city, if sanctioned by popular vote, to provide its own water plant, to supply itself and its inhabitants with water, and, if also approved by the voters, to acquire by agreement with the water company its plant. The voters of the city, however, decided not to purchase the plant, but to establish and maintain an independent water supply system. On June 14, 1894, an act, designated as chapter 474, was passed by the legislature, forbidding the city of Newburyport, in the event that the water company, within thirty days after the passage of the act, elected to offer its property for sale to the city, from acting under the authority of chapter 471 of the acts of 1893, unless the city first purchased the plant of the company. A copy of the act is inserted in the margin.*

* Chapter 474.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows: Sec. 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport, in writing, that it desires to sell to said city all the rights, privileges, easments, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the acts of the year eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same. Whenever said

Availing themselves of the privilege conferred by this act, the stockholders of the water company voted to sell to the city, and served notice to that effect upon the mayor. The city, by a popular vote, decided to buy.

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city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall, within twenty days after the vote aforesaid, execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If at the first meeting a majority of the voters present and voting do not vote to purchase said property, other meetings may be called and held therefor. In case the said city and the said company shall be unable to agree upon the value of said property, the Supreme Judicial Court, shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or account of the franchise of said company.

SEC. 2. In case said Newburyport Water Company shall convey its property to the city of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the provisions of chapter four hundred and seventy-one of the acts of the year eighteen hundred and ninety-three.

SEC. 3. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount sufficient for such purpose; such bonds, notes or scrip shall bear on their face the words "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and countersigned by the water commissioners provided for by chapter four hundred and seventy-one of the acts of the year eighteen hundred and ninety-three. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions at it may deem proper, provided that such securities shall not be sold for less than the par value thereof. The city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SEC. 4. In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the Supreme Judicial Court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase.

SEC. 5. This act shall take effect upon its passage.

Approved June 14, 1894.

The water company thereupon, on January 20, 1895, executed and delivered to the city a deed of all its property, both corporeal and incorporeal. In accepting the deed, however, the city served upon the water company the notice printed in the margin.*

Under the deed of the water company the city took possession of the plant. The parties being unable to agree as to the sum to be paid, the water company petitioned the Supreme Judicial Court for the county of Essex, to appoint three commissioners to fix the amount, which was done. Hearings were had and the commissioners made an award of $275,000, but no allowance was made for the franchise or right of the water company to lay and maintain pipes in the streets and for its right to collect water rates or for the profits which the company might have made on the contract for furnishing water to the city for fire purposes, had not the sale of the plant to the city taken place It is stipulated by counsel that the commissioners did not value such contract, "it being their opinion that the same in law could not be valued," and that although the water company offered the contract before the commissioners "no evidence of the quantity of water supplied to the city under the contract, nor any direct evidence of the cost of performing the contract or of its value to the company," was introduced. The stipulation also recites—

"That counsel for the city in his closing argument asked counsel for the water company if he had waived the claim to have the contract valued, and the latter replied that he did not waive it, and was not prepared to say what use he should make of it. That thereupon counsel for the city proceeded to argue that the contract should not be valued; that the counsel for the water company in his closing argument mentioned the contract as one of the items of property which the company had parted with to the city, and urged, but not in this connection, that it was the duty of the commissioners to estimate the value of all of the property of the company as one whole."

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*To the Newburyport Water Company:

In accepting the conveyance made to the city of Newburyport by the Newburyport Water Company, dated January 29, 1895, and delivered to the mayor on that day by the clerk of that corporation for examination, it is not admitted, on behalf of the city, that any franchise is acquired by the said city under such conveyance, or that the city is under any obligation to make payment on account of any franchise of said corporation by reason thereof.

It is further not admitted or claimed that the four filters, with their gates, pipes, appliances and appurtenances, described in item 2 of said deed as situated upon the second lot of land described in item 1 therein, are used in supplying said city or its inhabitants with water, or that the city is bound to pay for the same or any part thereof.

It is further not admitted or claimed that the Newburyport Water Company has any right or authority to convey by said conveyance, or the city Newburyport to accept or make payment for anything whatever, except according to provisions of chapter 474 of the act of 1894.

Adopted by a unanimous yea vote, six aldermen present and voting.

The report on the award made by the commissioners was heard before a single justice of the Supreme Judicial Court, who reserved for the full court whether the award should be recommitted or be accepted. The full court affirmed and accepted the award of the commissioners. (168 Mass. 541.) A rehearing was applied for, but while the petition was pending the water company brought the present suit in equity in the Circuit Court of the United States for the District of Massachusetts. After the bringing of such equity suit the petition for rehearing was dismissed.

In the bill of complaint the foregoing facts, except as to the recited provisions referred to as embraced in the stipulation, were set out with much amplitude, and it was alleged that no claim was made before the commissioners or in the State courts (except in the petition for rehearing) that the act of 1894 was repugnant to the Constitution of the United States.

In substance, the grounds for relief propounded in the bill were that as the act of the legislature which gave the privilege to the water company to sell had been construed by the Supreme Judicial Court as not entitling that company, on the sale by it made to the city, to compensation for its franchises and other valuable incorporeal rights, that act as construed amounted to a taking of the property of the water company, against its consent, without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States. The bill based this contention upon the charge that as the legislative act which gave the company the privilege to sell to the city, if it chose to do so, was coupled with the right conferred upon the city, if the company did not sell, to erect a water plant of its own, the sale by the company was compulsory, since the execution by the city of the authority to erect its own plant would have worked the ruin of the water company. In addition, it was charged in the bill that the failure under the legislative act, of which the company had availed itself, to value the future profits which the company might have derived from its contract to furnish the city with water, impaired the obligation of the contract arising from the charter, in violation of the contract clause of the Constitution of the United States. Charging that it was the intention of the city to issue bonds for the purpose of raising funds with which to pay the award in question, the bill prayed an injunction and the appointment of a receiver to manage the property claimed by the water company, which it had conveyed to the city, until the controversy was finally determined. The ultimate and substantial relief sought by the bill was, first, a restoration to the water company of the property which it had conveyed to the city, with damages for its detention, and in the alternative that full compensation be awarded. The city, appearing specially for the purpose, moved to dismiss for want of jurisdiction. This, after hearing, was overruled. Thereupon a demurrer was filed to the bill, which, after argument, was overruled.

Application was next made for a rehearing on the demurrer, and pending action thereon an answer and replication were filed. The application for a rehearing on the demurrer was overruled. A motion was then made for leave to file a special demurrer to that portion of the bill and prayer in which a right to a decree for compensation was asserted. This was refused, and thereafter, by consent of parties, the following order was made by the court:

"*Ordered:* That the constitutional question, to wit, whether or not the plaintiff has been deprived of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, be first heard; and that all questions as to plaintiff's relief, if any, (including questions of valuation of the property alleged to have been taken), await the determination of the constitutional question."

Soon afterwards a hearing was had upon the question referred to in said order, and the decision of the court was adverse to the water company. (103 Fed. Rep. 584.) After this the court heard argument upon the contention of the water company that the act of 1894 impaired the obligation of its contract with the city, and in consequence violated section 10 of article I of the Constitution of the United States. It was decided that the failure to value the contract in question "does not tend to prove that the act of 1894 was repugnant to the contract clause of the Constitution." The court having thus decided all the constitutional questions raised by the water company against that company, entered a final decree dismissing the bill. This appeal, directly to this court, was then taken.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

At the threshold we are met with the objection, raised below and urged at bar, that the Circuit Court was without jurisdiction, because the bill on its face did not state a case arising under the Constitution or laws of the United States, within the intendment of the act of August 13, 1888. (25 Stat. 433.) As the case is here on direct appeal from the decree of the Circuit Court of the United States, the solution of this question necessarily involves also deciding whether the cause was properly brought to this court. As the existence of the constitutional question is the only basis of the right to the direct appeal, if there was no such question in the court below there was and is no such issue by which the direct appeal to this court can be sustained. Under these circumstances, if the contention as to want of jurisdiction of the court below, arising from the alleged absence of constitutional questions, be well founded, our duty is not simply to dismiss the appeal, but to reverse the decree below with instructions to the Circuit Court to dismiss the bill for want of jurisdiction. (*Defiance Water Company* v. *Defiance*, 191 U. S. 184.)

If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit. (*Underground Railroad* v. *City of New York*, not yet reported; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Owensboro* v. *Owensboro Water Co.*, 191 Ib. 358; *Defiance Water Co.* v. *Defiance*, 191 Ib. 184; *Swafford* v. *Templeton*, 185 Ib. 487; *McCain* v. *Des Moines*, 174 Ib. 168, 181, and cases cited.) Whether the Constitution of the United States was and is, in a real and substantial sense, involved depends upon apparently two considerations: First, the proposition that the sale made by the company to the city was compulsory, and hence there was a taking of the property in disregard of due process of law; and, second, that the failure of the commissioners to value the future profits arising from the contract for the furnishing for fires of a water supply to the city impaired the obligations of the company's contract. We say apparently two, since the questions are virtually one, depending both on the same considerations.

Now, it is conceded that the charter of the water company was not exclusive, and was subject to repeal, alteration or amendment at the will of the legislature. This being the case, it is evident that no deprivation of property without due process of law or impairment of the obligations of a contract did or could arise from the act of the legislature empowering the city to erect its own waterworks. Having this power, the legislature could therefore have exercised it without compelling the city to buy the plant of the water company, and the bill proceeds upon the theory that if this right had been exerted by the legislature the company would have been ruined, and the value of its property in effect entirely destroyed. This follows, because the averments are based upon the assumption that the conveyance by the company of its property to the city was not voluntary, since, if it had not so conveyed, the exercise by the city of the right to construct its own plant would have destroyed the company's property. The contentions, therefore, as to the Constitution of the United States are based solely upon the proposition that because the legislature sought to protect the company and save its property from ruin by conferring upon it the privilege of selling its property to the city, if it chose to do so, thereby compulsion and consequent violation of the Constitution of the United States arose. In other words, that because there was conferred a benefit upon the corporation, which the legislature need not have bestowed, and which the company availed of, that its property was taken from it forcibly and without its consent. When the contention is thus reduced to its ultimate analysis, it comes to this—that the property of the company was taken from it with-

out its consent, because by the action of the legislature, for the benefit of the company, it was enabled to sell its plant to the city and thus escape a serious loss. Indeed, in reason, the theory upon which the bill is based could not be maintained without deciding that the company had an exclusive contract, and therefore that there was a want of power in the legislature to authorize the city to erect its own plant; or, what is tantamount thereto, declaring that, although there was no exclusive right and therefore power in the legislature, to give the city the right to erect its own plant, that body must have abstained from the exercise of its lawful authority, unless it determined to exert it so as to destroy and ruin the company. The power being in the legislature, it was competent for that body to exert it for the benefit and in the interest of the water company, to enable that company, if it chose to sell its plant upon the terms stipulated, and thus avoid the loss which otherwise, the bill avers, would have been entailed. And these considerations take this case out of the reach of the authorities which are relied upon as establishing that one cannot enforce a contract benefit derived from or advantage gained over another, by coercing his will by means of threats, even of the doing of a lawful act. The advantage resulting from the power conferred upon the company to sell enured to its benefit, since it saved it from a ruin which otherwise would have been occasioned. No compulsion in any legal sense can be said to have been exerted on the company by the option given it, because the exercise by the company of the option, upon its own theory of the case, saved its property from destruction. To indulge in the assumption that the action of the company was not voluntary would require the assumption that the company would have willingly suffered a most grievous wrong when, by accepting as it did the benefits of the act, such consequences were averted. The Supreme Judicial Court of Massachusetts, in passing upon the award made by the commissioners, aptly said (168 Mass. 554):

"It must be remembered that the transaction before us springs out of a voluntary offer by the petitioner to sell upon the statutory terms, and therefore there is no reason to try to bend those terms in its favor. Of course, an offer by a water company made under the threat of municipal competition and to avoid ruin, might be voluntary only in name. But we have no reason to assume in this case that the petitioner is the victim of robbery, and must treat it as having acted of its free choice in fact as well as in form."

It is to be observed that in the legislative act which the company accepted, and in furtherance of which it voluntarily conveyed its property to the city, it was expressly stipulated that the value of such property "should be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." It is also worthy of note that before the State courts the only question presented for consideration was the proper interpretation of the statute in ques-

tion, and whether or not it provided for payment for certain incorporeal rights and franchises which the water company contended should have been allowed for by the commissioners. Having accepted the statute, conveyed its property to the city, provoked the State proceedings to value the property and derived the benefits resulting from the legislation of the State of Massachusetts, the water company may not now, because of disappointment at the result of the interpretation which the statute received at the hands of the State court, change its position and cause its voluntary acceptance to become an involuntary one in order to assail the constitutionality of the legislation in question.

Concluding, for the foregoing reasons, that the rights asserted in the bill under the Constitution of the United States, upon which the jurisdiction of this court depends and upon which also the jurisdiction of the lower court depended, were so attenuated and unsubstantial as to be absolutely devoid of merit, our duty is to direct that the decree of the Circuit Court be reversed at appellant's costs, and that the case be remanded to that court with instructions to dismiss the bill for want of jurisdiction.

And it is so ordered.

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Supreme Court of the United States.

No. 183.—October Term, 1903.

The Gloucester Water Supply Company, Appellant, *vs.* The City of Gloucester.	Appeal from the Circuit Court of the United States for the District of Massachusetts.

[April 4, 1904.]

Mr. Justice White delivered the opinion of the Court.

In the main, this case is like that of *Newburyport Water Company* v. *The City of Newburyport*, just decided.

The Gloucester Water Company was engaged in supplying the city of Gloucester and its inhabitants with water under a non-exclusive charter and a non-exclusive hydrant contract made with the city. Under the authority of a statute enacted in 1895, similar in tenor to the act of 1894 considered in the Newburyport case, the Gloucester company sold its plant to the city of Gloucester. After the sale the company petitioned for the appointment of commissioners to value the property. Objections were made by both parties to the award, and the objections were reserved for consideration to the full bench of the Supreme Judicial Court of Massachusetts. That court accepted the award for the sum of $576,544 with interest. (179 Mass. 365.) Thereafter the present suit in equity was instituted in the Circuit Court of the United States for the District of Massachusetts, the bill filed containing substantially similar allegations to those made in the Newburyport case. Similar relief was also sought, except that there was no claim that the commissioners had not made an allowance for the unexpired term of the hydrant contract. After the decision in the Newburyport case the Circuit Court sustained a demurrer and dismissed the bill on the merits.

For the reasons stated in the opinion delivered in the Newburyport case, the decree of the Circuit Court is reversed at appellant's costs, and the case remanded, with instructions to dismiss the bill for want of jurisdiction.

True copy.

Test:

Clerk Supreme Court, U. S.